

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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DARRELL SIMS,

Plaintiff,

- against -

08 Civ. 5965(JGK)

THE CITY OF NEW YORK,

Defendant.

MEMORANDUM OPINION AND  
ORDER

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JOHN G. KOELTL, District Judge:

The plaintiff, Darrell Sims, moves for reconsideration of the judgment clerk's award of costs to the defendant, the City of New York.

I.

The plaintiff filed a complaint against the defendant in July 2008, alleging employment discrimination. (Lindsay Decl. ¶ 3). On September 30, 2010, the Court partially granted the defendant's motion for summary judgment. See Sims v. City of New York, No. 08 Civ. 5965, 2010 WL 3825720, at \* 13 (S.D.N.Y. Sept. 30, 2010). The first trial began on January 18, 2011, and on January 30, the jury was discharged after being unable to reach a verdict. (Lindsay Decl. ¶¶ 6-7). A second trial began on April 26, 2011. (Id. at ¶ 8). On May 5, 2011, a jury found for the defendant, and the plaintiff's complaint was dismissed. (Id. at ¶ 9-10). On June 7, 2011, the defendant filed an

application with the judgment clerk for costs totaling \$7,012.87. (Lindsay Decl. Ex 1 ("Application"), at ¶ 9). The judgment clerk awarded the defendant \$5,334.18, which represented the costs of (1) the original and one copy of the plaintiff's deposition transcript, (2) the trial transcript from the first trial, and (3) the trial transcript from the second trial. (Lindsay Decl. ¶¶ 16-17.) The Clerk reduced the costs sought by the defendant to only the original and one copy of the plaintiff's deposition transcript, and reduced the costs of the trial transcripts by excluding the costs of diskettes and minuscpts.<sup>1</sup> In response, the plaintiff filed a motion for reconsideration, contending (1) that the defendant should not be able to recover costs for the plaintiff's deposition testimony because the plaintiff's motion for summary judgment "was not decided in [the] defendant's favor in its entirety," (2) that the defendant should not be able to use the second trial as a way to recoup the costs of the transcript from the first trial,

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<sup>1</sup> Based on the invoices, the judgment clerk should have awarded \$5,333.47, which is the sum of \$3,646.89, the cost of the first trial transcripts, \$1,154.58, the cost of the second trial transcripts, and \$532.00, the amount awarded to the defendant for deposition transcripts by the judgment clerk in the bill of costs. (See Lindsay Decl. Ex.1 at Ex C; Lindsay Decl. Ex. 3.) The final figure reached below reflects that.

and (3) that the plaintiff cannot bear the economic burden of the award.

## II.

Generally, Federal Rule of Civil Procedure 54(d) "allows the district court to award the prevailing party its costs. However, . . . the types of costs which may be shifted are limited by 28 U.S.C. § 1920." Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp., 95 F.3d 153, 171 (2d Cir. 1996) (citation omitted). Section 1920 provides that the following costs may be taxed, among others: "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case." 28 U.S.C. § 1920. Local Rule 54.1(c) gives further guidance as to items taxable as costs. It provides, in relevant part:

### Items Taxable as Costs

(1) Transcripts. The cost of any part of the original trial transcript that was necessarily obtained for use in this court or on appeal is taxable. . . .

(2) Depositions. Unless otherwise ordered by the court, the original transcript of a deposition, plus one copy, is taxable if the deposition was used or received in evidence at trial, whether or not it was read in its entirety. Costs for depositions are also

taxable if they were used by the court in ruling on a motion for summary judgment or other dispositive motion.

Local Civ. R. 54.1(c). "The burden is on the prevailing party to establish to the court's satisfaction that the taxation of costs is justified." John G. v. Board of Education of Mt. Vernon Public Schools, 891 F. Supp. 122, 123 (S.D.N.Y. 1995); see also AIG Global Sec. Lending Corp. v. Banc of America Sec. LLC, No. 01 Civ. 11448, 2011 WL 102715, at \*2 (S.D.N.Y. Jan. 06, 2011).

**A.**

It is plain that the transcript of the plaintiff's deposition was used during the course of the second trial. See (Trial Transcript ("Tr.") at 225-27). Also, the deposition was used by this Court in its evaluation of the defendant's motion for summary judgment. See Sims, 2010 WL 3825720, at \*3, \*5. The plaintiff, however, claims that the defendant was not a fully prevailing party in its motion for summary judgment, and therefore it cannot recover the costs of the deposition transcript. Regardless of whether the defendant was, within the meaning of Local Rule 54.1, a "prevailing party" in the summary judgment motion, the defendant was unquestionably the prevailing

party at the second trial, during which the deposition was used to impeach the plaintiff. Moreover, "it is now well-established that a deponent's testimony at trial 'alone is sufficient to end the inquiry as to whether their depositions were 'used' at the trial.'" Farberware Licensing Co. v. Meyer Mktg. Co., No. 09 Civ. 2570, 2009 WL 5173787, at \*5 (S.D.N.Y. Dec. 30, 2009) (quoting Perry v. Metropolitan Suburban Bus Auth., 236 F.R.D. 110, 112 (E.D.N.Y. 2006)), aff'd 428 F. App'x 97 (2d Cir. 2011).

**B.**

The plaintiff similarly objects to the award of costs for the transcript of the first trial because the defendant did not prevail at the first trial. This argument is also without merit. The transcript of the first trial was clearly necessary for the purposes of use at the second trial, particularly for purposes of impeachment of the plaintiff. See Bennett Chem. Co v. Atl. Commodities, Ltd., 24 F.R.D. 200, 203 (S.D.N.Y. 1959) (insofar as the transcript of the first trial was used during the new trial, award of costs was proper); see also Local Civ. R. 54.1(c)(1).

## C.

The plaintiff also objects to the award of costs to the defendant for the transcript of the second trial. Although the Defendant argues that the transcript was necessary in order to prepare for cross examination, summation and the jury charge, "[u]se of the transcripts during trial ... does not mean they were 'necessarily obtained.'" John G., 891 F. Supp. at 123 (citing Galella v. Onassis, 487 F.2d 986, 999 (2d Cir. 1973)). "The mere convenience to counsel is insufficient to justify the taxation of costs." Id. (quotation marks omitted). Moreover, when the trial in question is "not overly long or complicated," the attorneys present can take notes sufficient for use during cross examination and summation. See Karmel v. City of New York, No. 00 Civ. 9063, 2008 WL 216929, at \*3 (S.D.N.Y. Jan. 9, 2008). Here, the trial lasted for less than two weeks, and two attorneys for the defendant were present for the trial. Moreover, the defendant has not suggested the trial was overly complex. Therefore, transcripts of the proceedings were a convenience, not a compensable necessity. See id. (denying trial transcripts because the trial lasted only twenty-two days and two defense attorneys were present during the trial); Dehoust v. Baxter Healthcare Corp., No. 98 Civ. 0774, 1999 WL 280423, at \*3 (S.D.N.Y. May 4, 1999) (denying trial transcripts costs

because the trial lasted less than two weeks and did not involve any complexities). Accordingly, the award of costs to the defendant is reduced by the amount of costs associated with the second trial transcripts, \$1,154.58. (See Lindsay Decl. Ex. 1 at Ex C.)

### III.

Finally, the plaintiff asserts that the Court should consider his financial situation when determining whether to reconsider the award of costs. In using its discretion to determine the award of costs, a court may consider the financial status of the party against whom the award is sought. See Burchette v. Abercrombie & Fitch Stores, Inc., No. 08 Civ. 8786, 2010 WL 3720834, at \*4 (S.D.N.Y. Sept. 22, 2010). However, "indigency per se does not preclude an award of costs against an unsuccessful litigant." Id. (quoting Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001)). "If relying on the losing party's financial circumstances, the non-prevailing party must make a strong showing of financial hardship." Perks v. Town of Huntington, No. 99 Civ. 4811, 2008 WL 8091034, at \*4 (E.D.N.Y. Mar. 31, 2008) (collecting cases).

Here, the plaintiff has provided no evidence that the award would impose a substantial hardship. He offers only conclusory

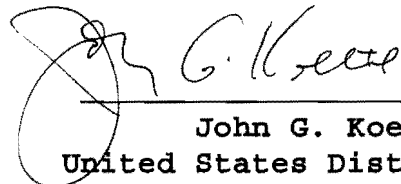
allegations of his inability to pay and points out that his yearly salary is \$83,000. Without any support, this statement falls short of a "strong showing," particularly because the award to the defendant has been further reduced by more than twenty per cent. Accordingly, the Court declines to reconsider the award of costs based on the plaintiff's financial situation.

#### CONCLUSION

The Court has considered all of the arguments raised by the parties. To the extent not specifically addressed, the arguments are either moot or without merit. The plaintiff's motion for review of the judgment clerk's award of costs is **granted in part and denied in part**. The plaintiff shall therefore pay costs in the amount of \$4,178.89. The Clerk is directed to close **Docket No. 70**.

SO ORDERED.

Dated:       New York, New York  
              October 10, 2011

  
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John G. Koeltl  
United States District Judge